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Stanley B. Rosenfield

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## FACTORS IN DETERMINATION OF THE VALIDITY OF DOMESTIC AIRLINE FARES

STANLEY B. ROSENFELD\*

### I. INTRODUCTION

Consideration of the validity of air fares involves two questions, one general and one specific. The general question involves the basic problem of a determination of the rate of return to which all airlines should be entitled, and the rate base on which this rate of return should be applied. This question is applicable to the airline industry as a whole. General standards for the industry were first set by the Civil Aeronautics Board (hereinafter referred to as the Board or CAB) in 1960, in the only general fare investigation which has been carried through to completion.<sup>1</sup> The Board, by its order of January 29, 1970, instituted a new investigation to review these general standards.<sup>2</sup> The matter is presently pending.

The second question is more specific. It involves the validity determination of a specific tariff filed by an individual airline. An airline files a tariff covering coach traffic; an airline files a reduced fare for all passengers traveling on its three a.m. flight between Chicago and Los Angeles; an airline files a reduced fare for all youths between the ages of 12 and 22. One fare is accepted without question; another fare may be the subject of protracted hearing and litigation; still another may be summarily rejected. What determines the acceptance or rejection of an individual fare? Are there standards by which validity of a specific fare will be determined? If so, what are these standards, and how are they applied by the Board and the courts? It is to these questions, involving the validity determination of a specific individual air tariff, that this article is devoted.<sup>3</sup>

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\*Assistant Professor of Law, DePaul University; L.L.B., University of Minnesota 1951; L.L.M., Southern Methodist University 1969.

1. General Passenger-Fare Investigation, 32 C.A.B. 291 (1960).

2. Domestic Passenger Fare Investigation, CAB Order No. 70-1-147 (Jan. 29, 1970).

3. In this article, reference will be made from time to time to the Interstate Commerce Act, which created the earliest regulatory agency in the transportation field. 24 Stat. 379 (1887). It provided the predecessor to regulation in the aviation field. Much of the language used in the original Civil Aeronautics Act, 52 Stat. 973 (1938), and carried forward to the present Federal Aviation Act of 1958, 49 U.S.C. § 1301 *et seq.* (1970), was taken from the motor carrier section of the Interstate Commerce Act pt. II, 49 U.S.C. § 301 *et seq.* (1970). Although judicial interpretation given the Interstate Commerce Act is relevant to aviation, it should be kept in mind that there are fundamental statutory differences. Basically the Interstate Commerce Commission is charged with regulating three competing modes of transportation—rail, motor and water—while the Civil Aeronautics Board is solely concerned with the needs of air transportation. *Transcontinental Bus System, Inc. v. CAB*, 383 F.2d 466, 484 (5th Cir. 1967), *cert. denied*, 390 U.S. 920 (1968).

## II. THE FILING OF TARIFFS

Section 403 of the Federal Aviation Act (hereinafter referred to as the Act) requires all tariffs to be filed with the CAB and kept open to public inspection.<sup>4</sup> Each tariff must be filed at least 30 days in advance of its effective date.<sup>5</sup> The Board is empowered to reject any tariff filing which does not conform with procedural requirements of section 403 or the regulations enacted thereunder by the Board.<sup>6</sup> If a tariff is rejected, it is void and of no effect and may not be used by an airline.<sup>7</sup>

If no objection is filed, a tariff becomes effective as specified within the terms of the tariff. However, in addition to the procedural Board objection, objection may be filed to a tariff on the basis that it is, or will be, unjust or unreasonable, unjustly discriminatory, or unduly preferential and prejudicial.<sup>8</sup> A substantive objection may be filed by either the Board, on its own motion, or by a third party having a sufficient interest.<sup>9</sup> Third party objections are ordinarily filed by another airline which deems itself adversely affected.<sup>10</sup>

The Board may dismiss a complaint without hearing where, in the

4. Federal Aviation Act of 1958 § 403, 49 U.S.C. § 1373 (1970).

5. 14 C.F.R. § 221.160 (1971). Section 221.190 provides for less than 30 days notice in case of actual emergency.

6. 14 C.F.R. § 221.3 (1971).

7. 14 C.F.R. § 221.182 (1971).

8. Federal Aviation Act of 1958 § 1002(d), 49 U.S.C. § 1482(d) (1970) (in part):

Whenever, after notice and hearing, upon complaint, or upon its own initiative, the Board shall be of the opinion that any individual or joint rate, fare, or charge demanded, charged, collected or received by an air carrier for interstate or overseas air transportation, or any classification, rule, regulation, or practice affecting such rate, fare, or charge, or the value of the service thereunder, is or will be unjust or unreasonable, or unjustly discriminatory, or unduly preferential, or unduly prejudicial, the Board shall determine and prescribe the lawful rate, fare, or charge (or the maximum or minimum, or the maximum and minimum thereof) thereafter to be demanded, charged, collected, or received, or the lawful classification, rule, regulation, or practice thereafter to be made effective . . . .

9. Federal Aviation Act of 1958 §§ 1002(a), (d), 49 U.S.C. §§ 1482(a), (d) (1970). Subsection (d) is quoted note 8 *supra*.

10. The range of third parties having "sufficient interest" has been considerably broadened by two recent federal court decisions in which bus companies were held to have standing to question airline fares. In both, the court conceded that mere competition with ground transportation had not previously provided valid grounds for objection to an airline tariff. Nevertheless, insofar as an abuse would result in a harm to the traveling public, the courts stated that bus companies may represent and vindicate the public right and public interest. *Trailways of New England, Inc. v. CAB*, 412 F.2d 926 (1st Cir. 1969); *Transcontinental Bus System, Inc. v. CAB*, 383 F.2d 466 (5th Cir. 1967), *cert. denied*, 390 U.S. 920 (1968). Prior to these decisions, the Board's power to preserve the inherent advantages of air transportation (Federal Aviation Act of 1958 § 102(b), 49 U.S.C. § 1302(b) (1970)) had been said to prevent any other form of transportation from questioning airline rates. *Flying Tiger Line, Inc. v. CAB*, 350 F.2d 462 (D.C. Cir. 1965); *New York-Florida Case*, 24 CAB 94 (1956); *Northeast Airlines, Consolidation of Route Nos. 27, 65, and 70*, 6 CAB 541 (1945).

Board's opinion, the complaint does not state facts which warrant an investigation.<sup>11</sup> This power is not unlimited, however. Once a complaining party makes a *prima facie* showing that a fare is discriminatory, it is incumbent upon the Board to show affirmatively the public policy reasons for not investigating the tariff, or that such discrimination is justified in terms of established Board policy.<sup>12</sup>

If the Board determines that it will investigate the proposed fare, it may suspend the fare, pending determination of its validity,<sup>13</sup> or it may allow the fare to go into force, pending determination of its validity.<sup>14</sup> In any case, a new or revised tariff cannot be used until after appropriate notice and publication.<sup>15</sup>

Once a fare has been set, an air carrier is required to charge the fare and not vary from the provisions of the tariff without filing a new or revised tariff. There is one exception. A carrier is authorized to offer free or reduced rate transportation to several specific groups, including generally directors, officers and employees of the airline and their families, attorneys and witnesses attending a legal investigation involving the airline, persons involved in or connected with an air accident, or when the transportation is in connection with an accident or for the purpose of relief in the case of a public disaster.<sup>16</sup> However, the groups to which this exception applies are strictly limited to those specified in the statute. The Board may not expand the exemptions.<sup>17</sup>

### III. STATUTORY CONSIDERATIONS OF VALIDITY

Section 404 (a) of the Act states that it is the duty of every air carrier to establish just and reasonable rates.<sup>18</sup> Section 404 (b) prohibits

11. Federal Aviation Act of 1958 § 1002 (d), 49 U.S.C. § 1482 (d) (1970), quoted note 8 *supra*.

12. *Trailways of New England, Inc. v. CAB*, 412 F.2d 926 (1st Cir. 1969).

13. Federal Aviation Act of 1958 § 1002 (g), 49 U.S.C. § 1482 (g) (1970).

14. This was done in *Transcontinental Bus System, Inc. v. CAB*, 383 F.2d 466 (5th Cir. 1967), *cert. denied*, 390 U.S. 920 (1968). This matter has been pending for over 4½ years.

15. Federal Aviation Act of 1958 § 403 (c), 49 U.S.C. § 1373 (c) (1970) (in part):

No change shall be made in any rate, fare, or charge, or any classification, rule, regulation, or practice effecting such rate, fare, or charge, or the value of the service thereunder, specified in any effective tariff of any air carrier or foreign air carrier, except after thirty days notice of the proposed change filed, posted, and published in accordance with subsection (a) of this section . . .

16. Federal Aviation Act of 1958 § 403 (b), 49 U.S.C. § 1373 (b) (1970).

17. *Transcontinental Bus System, Inc. v. CAB*, 383 F.2d 466 (5th Cir. 1967).

18. Federal Aviation Act of 1958 § 404 (a), 49 U.S.C. § 1374 (a) (1970):

It shall be the duty of every air carrier to provide and furnish interstate and overseas air transportation, as authorized by its certificate, upon reasonable request therefor and to provide reasonable through service in such air transportation in connection with other air carriers; to provide safe and adequate service, equipment, and facilities in connection

any undue or unreasonable preference or advantage to any particular person, port, locality, or description of traffic . . . or . . . unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever.<sup>19</sup>

Using the language of section 1002 (d) of the Act<sup>20</sup> (which gives the Board the power to prescribe rates and practices of air carriers), these prohibitions have been broken down into three distinct—but closely related—requirements, all involving some form of “discrimination.” A proposed tariff must not be:

- A. unjust or unreasonable,
- B. unjustly discriminatory, or
- C. unduly preferential or prejudicial.

The problem with these requirements is that often the distinctions are blurred by imprecise use of the terminology; for example, the Board and the courts frequently speak of “unjust discrimination” when they are discussing conduct which is “unjust or unreasonable” or “unduly preferential or prejudicial.” Therefore, it is often difficult to determine upon which requirement a particular decision is based.<sup>21</sup>

The distinction between the requirements is based upon the type and effect of the discrimination involved. Thus, rates which are “unjust and unreasonable” are those which are discriminatory in terms of rate structure, *i.e.*, there is a distinction in treatment under the rate structure *vis-a-vis* another rate which is economically sound. “Unjust discrimination” refers to discrimination related to service or persons, *i.e.*, there is a distinction in treatment between types of service offered at the same fare, or a distinction in the fares to different persons. “Undue preference or prejudice” refers to discrimination based on distance or location, *i.e.*, there is

with such transportation; to establish, observe, and enforce just and reasonable individual and joint rates, fares, and charges, and just and reasonable classifications, rules, regulations, and practices relating to such air transportation, and, in case of joint rates, fares, and charges, to establish just, reasonable, and equitable divisions thereof as between air carriers participating therein which shall not unduly prefer or prejudice any of such participating air carriers.

19. Federal Aviation Act of 1958 § 404 (b), 49 U.S.C. § 1374 (b) (1970).

20. *Id.* § 1002 (d), 49 U.S.C. § 1482 (d), quoted note 8 *supra*.

21. *See, e.g.*, Investigation of Full Adult Fares for Unaccompanied Children, 24 CAB 408 (1956).

One of the reasons for the difficulty experienced by the Board and the courts in distinguishing these requirements is historical. Analysis indicates that the term “discrimination” from its historical base in the Interstate Commerce Act relates specifically to the practice of rebating in its various forms. *See* Rosenfield, *A Case for the Legality of Youth Standby and Young Adult Airline Fares*, 36 J. AIR L. & COM. 615 (1970). Rebating has never been a problem in the airline industry. The use of the term “discrimination” in the airline industry has followed the layman’s definition, *i.e.*, a “distinction in treatment.” RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 411 (unabr. ed. 1967).

a distinction in service or fare based on distance traveled or based on the point to which service is rendered.

The terms "unjust and unreasonable," "unjustly discriminatory" and "unduly preferential or prejudicial" are nowhere defined in the Act. It has been determined, however, that, in any interpretation and application of these terms, the declaration of policy set out in section 102 and the rules of ratemaking set out in section 1002 must be considered.<sup>22</sup>

Section 102 is entitled "Declaration of Policy: The Board," and provides that the Board shall consider, *among other things*, the following as being in the public interest:

- A. The encouragement and development of air transportation,
- B. The recognition and preservation of the inherent advantages of air transportation,
- C. The promotion of adequate, economical and efficient service at reasonable rates and without unjust discrimination or undue preference,
- D. Competition necessary to assure sound development of air transportation,
- E. Promotion of air safety, and
- F. Promotion and development of civil aeronautics.<sup>23</sup>

The phrase "among other things" shows clearly the congressional intention that the six specified considerations should not be construed as exclusive. The Board has confirmed this interpretation, and determined that this section provides only some of the elements to be considered in the public interest.<sup>24</sup>

The other section of the Act which the Board is required to take into consideration in a determination of rates is section 1002 (e), titled "Rule of Ratemaking." It provides that among other considerations, the Board shall consider the following in determination of air rates:

- A. the effect of the rate on movement of traffic;
- B. the need for adequate and efficient service at lowest cost consistent with such service;
- C. the standards of service to be rendered;
- D. the inherent advantages of air transportation; and
- E. the need of each carrier for revenue sufficient to provide adequate and efficient air service.<sup>25</sup>

Both sections 102 and 1002 were first enacted in the original Civil Aviation Act of 1938.<sup>26</sup> In fact, all four sections here considered, 403, 404, 102 and 1002, have come down to the present from the original Act of

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22. National Airlines, Inc., DC-6 Daylight Coach Case, 14 CAB 331 (1951); The Hawaiian Common Fares Case, 10 CAB 921 (1949).

23. Federal Aviation Act of 1958 § 102, 49 U.S.C. § 1302 (1970).

24. Air Passenger Tariff Discount Investigation, 3 CAB 242 (1942).

25. Federal Aviation Act of 1958 § 1002 (e), 49 U.S.C. § 1482 (e) (1970).

26. 52 Stat. 980 (1938).

1938 with only minor changes in phrasing. Major changes were made in the Act in 1958, but without material change in these sections.<sup>27</sup>

The Board has held that section 1002 (d) gives the Board authority to enforce the provisions of sections 404 (a) (prohibiting unjust and unreasonable rates) and 404 (b) (prohibiting unjust discrimination and undue preference), and that in exercising this authority, the Board shall consider, among other factors, those set out in 1002 (e).<sup>28</sup> The Board must, in addition, be guided by the elements of the public interest in air transportation as set out in section 102.<sup>29</sup>

#### IV. UNJUST OR UNREASONABLE

Rates are "unjust and unreasonable"—and therefore invalid—if they are discriminatory in terms of rate structure. This involves consideration and determination of the factors bearing on the economic soundness of a tariff.

An airline is a public utility because it has a duty to provide its services to the public generally.<sup>30</sup> An airline is also a private company and is ultimately responsible to its stockholders. In order to satisfy its stockholders and to provide them with a return on their investment, it must sell its services at a price which is economically sound. A rate must cover all of the costs involved in doing business, both of a direct and indirect nature and, in addition, must provide a reasonable profit to the investors or else a company cannot stay in business. This is the basic rule of ratemaking in the air industry.<sup>31</sup>

The accepted principle, and a requirement to insure the continued existence of transportation service, is that the rate level must have a reasonable relationship to attainable cost levels.<sup>32</sup> While it is not necessary that a rate meet all costs of operation at all times, it must nevertheless be reasonably related to the cost of doing business, and it must at all times be reasonably related to an expected future level of costs.<sup>33</sup> If a particular rate is uneconomically low, it will place an undue burden on other types of traffic without compensatory benefit.

For the basic types of service, such as regular first class or coach service, the proposed fare must be capable of meeting the "fully allocated" cost of the service.<sup>34</sup> That is, all costs of doing business of whatever nature, whether direct or indirect, must be covered.

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27. H. R. REP. NO. 2360, 85th Cong., 2d Sess. (1968).

28. National Airlines, Inc., DC-6 Daylight Coach Case, 14 CAB 331 (1951); The Hawaiian Common Fares Case, 10 CAB 921 (1949).

29. Cases cited note 28 *supra*.

30. Pan-American World Airways, Inc. v. Boyd, 207 F. Supp. 152 (D.D.C. 1962).

31. Pittsburgh-Philadelphia No-Reservation Fare Investigation, 34 CAB 508 (1961); Air Freight Rate Investigation, 9 CAB 340 (1948).

32. Cases cited note 31 *supra*.

33. Air Freight Rate Investigation, 9 CAB 340 (1948).

34. Summer Excursion Fares Case, 11 CAB 218 (1950).

The peculiar nature of commercial air travel has, however, created the need for another type of rate, the promotional fare. An empty seat on a flight is probably more important to airlines than to any other form of transportation because of the inflexibility of airplane capacity. A train can add or remove cars according to demand, and a bus line can provide additional sections at a relatively reasonable cost. An airline can only add or remove airplanes, and because of the tremendous investment in each airplane, it is not economically feasible to have extra sections standing by for possible use. This problem is even more acute today with the wide-bodied jets with seating capacities ranging from 300 to 500.

Promotional fares are designed to fill seats which would otherwise remain vacant by offering special fares, usually at limited times when experience shows excess seating is ordinarily available. As business has failed to meet projected levels and plane capacity has increased, the number and type of promotional fares has proliferated. Some examples of promotional fares are: standby youth and military fares (reduced fares to youths (ages 12-21) and military personnel who are boarded just before flight, if seats are available); family fares (a reserved seat plan providing reduced fares to a spouse and children when traveling with the head of the household in a family group); golden age fares (reduced standby fares for citizens over 65 years of age); and "early-bird" flights (reduced fares for late night flights).

Basic fares are designed to pay all costs of operation and to return a profit. Promotional fares are geared to filling seats that are available and would otherwise remain empty. Therefore, it seems that a different test for validity should be applied to promotional fares than to basic fares. Nevertheless, promotional fares should not be set with complete disregard to cost of the service. To determine appropriate promotional fares, the Board has developed the "profit-impact" test. This test recognizes the validity of promotional fares designed to increase traffic during off-peak hours or during periods of low load factor. These fares are not expected to meet all costs of operation.<sup>35</sup> The "profit-impact" test requires that the proposed fare generate sufficient new traffic to offset the loss of revenue from self diversion plus the added costs of carrying the additional traffic.<sup>36</sup>

In determining whether the profit-impact test applies, a primary question is whether the carrier is scheduling for the reduced fare traffic involved. If the carrier is, in fact, making the same preparation for this traffic and expending the same cost in anticipation of this reduced-fare traffic as for its full-fare traffic, any justification for a reduced fare is negated. The theory of the profit-impact test is that all costs of operation do not have to be covered because the only seats being offered at the reduced price are

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35. Family Fare Tariffs-Complaint of Transcontinental Bus System, Inc., CAB Order No. E-26431 (Feb. 29, 1968).

36. *Id.*



those which would otherwise be empty. It is better to fill those seats at a reduced price than to allow them to remain empty.

The profit-impact test was first enunciated in a Board order issued in 1963.<sup>37</sup> The Board had previously recognized, however, that it was not necessary to allocate costs fully in all instances. In *Pittsburgh-Philadelphia No-Reservation Fare Investigation*,<sup>38</sup> the Board sustained the examiner's finding that a rate was unreasonable because the costs were not fully allocated, but the decision was based on the fact that Allegheny Airlines geared flight frequency and capacity to *both* the first class and the no-reservation traffic, and the no-reservation traffic was not being used simply to fill up available space. As early as 1948, the Board said that rates need not meet fully allocated costs at all times, although they must be reasonably related to costs.<sup>39</sup>

There are two factors to consider in determining whether the profit-impact test is applicable: (1) Does the reduced fare cover the added cost of the service?, and (2) does the additional traffic generated by the promotional fare offset the loss from diverted full fare traffic?

*Does the reduced fare cover the added cost of the service?* It has been argued that because the space is available, whether or not used, there can be no additional costs involved in a promotional fare.<sup>40</sup> This theory has been rejected because certain costs are directly attributable to any fare, *i.e.*, the cost of ticketing the passengers and the cost of advertising the fare. The added cost—the additional cost of carrying the promotional traffic—is the sum of the costs directly attributable to the fare. Items of cost not directly attributable to the traffic, for example, the cost of unused space remaining, are not included as cost factors in determining the economic soundness of a promotional fare under the profit-impact test.

The added cost must, however, be fully covered if the promotional traffic is not to become a burden on other types of traffic. Promotional rates must be fixed, if they are sound, not only with regard to the traffic they are expected to generate but also with sufficient regard for future attainable costs to assure that the rates will not have to be raised when the expected volume of traffic is realized.<sup>41</sup> The purpose of the discount fare is to stimulate additional traffic which would not otherwise be available. If such fare is successful, eventually the point will be reached where the traffic is no longer merely filling empty seats, and it is necessary to expand operations to accommodate all such traffic that has been generated. Once the stimulation of the discounted fare has resulted in sufficient new traffic to require expansion of operations to accommodate it, the profit-impact test will no longer be valid. Now the fare must be reasonably related to the

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37. CAB Order No. E-19372 (Mar. 13, 1963).

38. 34 CAB 508 (1961).

39. Air Freight Rate Investigation, 9 CAB 340, 345 (1948).

40. *Id.* The "no cost" theory.

41. *Id.*

fully allocated costs of service. Unless this fare can now meet the test of fully-allocated costs, it becomes unreasonable.<sup>42</sup>

*Does the additional traffic generated by the promotional fare offset the loss from diverted full fare traffic?* This presents a more difficult question, the measurement of the generation-diversion ratio. It is conceded that any reduced fare tariff will take some traffic from those who would otherwise travel at regular fares. If a reduced fare is to be valid, there must be a sufficient amount of new traffic gained by the reduced fare to offset the regular fare traffic that is lost. Whether sufficient new traffic is realized involves only a determination of the facts, but the facts are difficult to determine.<sup>43</sup> The Board recently stated what is probably the most reasonable rule, and the rule presently followed:

In the absence of some indication to the contrary, it is reasonable to assume that the carriers would not urge the continuance of . . . tariffs unless, as corporations operated with a profit motive, it was to their economic advantage to do so.<sup>44</sup>

The expanding number of promotional fares has brought an additional question. Suppose an airline has a youth discount fare, a military discount fare and a senior citizen discount fare. In determining the validity of each discount fare may or must the other discount fares be taken into consideration? Is it sufficient to consider each discount fare individually or must the overall effect of all promotional fares be considered? It is argued that, while an airline may not schedule for any one discount fare, it does take into consideration the total effect of the various reduced fares.<sup>45</sup> The consequences of treating each particular fare in a vacuum would mean that regular-fare traffic would be required to bear all the direct and indirect fixed costs occasioned by the operation of additional capacity to serve discount traffic. The industry contention is that additional capacity is not required to serve the discount traffic. This question is presently before the Board.<sup>46</sup> Evidence is presently being taken on this question by the trial examiner, and the final decision will have far reaching conse-

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42. *Trans World Airlines, Inc., Rates for Phonograph Records*, CAB Order No. E-22935 (Nov. 26, 1965).

43. In *Transcontinental Bus System, Inc. v. CAB*, 383 F.2d 466 (5th Cir. 1967), *cert. denied*, 390 U.S. 920 (1968), both surveys of passengers and statistical analysis were offered by the airlines. The Examiner's opinion was based on a judgment consideration that all of the surveys and analysis indicated the fare was valid, and, in addition, no evidence was offered to show that the fares were uneconomical. While this may be a somewhat backhanded approach, it is probably reasonable.

44. *Family Fares Tariffs-Complaint of Transcontinental Bus System, Inc.*, CAB Order No. E-26431, at 15,558 (Feb. 29, 1968).

45. *Id.*

46. In *Transcontinental Bus System, Inc. v. CAB*, 383 F.2d 466 (5th Cir. 1967), *cert. denied*, 390 U.S. 920 (1968), the matter was sent back to the trial examiner to develop a full factual record and to explore all possible alternative costing approaches. It is still pending. CAB Order No. 69-8-140 (Aug. 27, 1969).

quences. A determination that all discount fares must be considered together would bring an end to most, if not all, discount fares.

## V. UNJUST DISCRIMINATION

Rates are "unjustly discriminatory"—and therefore invalid—when they involve an unjustified distinction in treatment between customers. Usually this involves the offering of different types of service at the same rate or offering different fares to different persons for the same service.

The fact that a fare is different from another fare is not sufficient to bring it within the proscriptions of the Act, provided that the fare is offered to the public generally or to some proper class of the public. In 1951, daylight coach service was offered for the first time. The fare was lower than the fare for first-class carriage on the same flight. It was available to any member of the public desiring to travel by coach, and the Board held that while the tariff filed may present a problem of whether such rate is "just and reasonable", *i.e.*, whether it is economically valid, there was no issue of discrimination.<sup>47</sup>

Under section 404 (b), a rate is not illegal merely because it is discriminatory. The prohibition applies only to a rate that is *unjustly* discriminatory. There is no absolute rule to be rigidly applied, but rather it is a rule of reason, one requiring that the circumstances and conditions surrounding the discrimination be looked at before determining that a rate comes within the prohibition of the Act.<sup>48</sup> As the Act itself does not define "unjust discrimination," the Board has adopted<sup>49</sup> an interpretation of similar language in the Interstate Commerce Act. A rate is said to be unjustly discriminatory if it grants *different treatment to like traffic, for like and contemporaneous service, offered under substantially similar circumstances and conditions*.<sup>50</sup> The elements of this definition will be examined presently.

The fundamental rule in this area is the rule of equality. A carrier has a public duty to treat all customers with absolute impartiality under substantially similar circumstances. This rule was first expressed by the Interstate Commerce Commission during its first year of existence, when the Commission refused to allow a railroad to offer a reduced fare to passengers traveling for the purpose of looking at land of the railroad that was for sale. The railroad contended the reduced fare was not discriminatory because it was open equally to all who wanted to look at land of the rail-

47. National Airlines, Inc., DC-6 Daylight Coach Case, 14 CAB 331 (1951).

48. Transcontinental Bus System, Inc. v. CAB, 383 F.2d 466 (5th Cir. 1967), *cert. denied*, 390 U.S. 920 (1968); *cf.* Texas & Pac. Ry. v. ICC, 162 U.S. 197 (1896).

49. Transcontinental Bus System, Inc. v. CAB, 383 F.2d 466 (5th Cir. 1967), *cert. denied*, 390 U.S. 920 (1968); Summer Excursion Fares Case, 11 CAB 218 (1950).

50. Wight v. United States, 167 U.S. 512, 518 (1897) (emphasis added) *discussing* what is now Interstate Commerce Act § 2, 49 U.S.C. § 2 (1970).

road. Others, including the government, also had land for sale, and the reduced fare was not available to those looking at land of owners other than the railroad. In rejecting this proposed fare, the Commission said that in the transportation of passengers, carriers are performing a public duty under a franchise granted by the state, and they are, therefore, subject to the rule of law which requires absolute impartiality to all. "It will be very difficult to find any principle upon which the transportation of passengers in our country can be impartially and fairly carried on short of maintaining the rule of absolute equality . . . ."<sup>51</sup>

The Supreme Court affirmed the rule of equality, stating:

"The great purpose of the [Interstate Commerce] Act to regulate commerce . . . was to secure equality of rates as to all and to destroy favoritism . . . by prohibiting . . . forbidding rebates, preferences and all other forms of undue discrimination."<sup>52</sup>

### A. Like Traffic

As already indicated, a tariff is unjustly discriminatory if it grants different rates to like traffic, for like and contemporaneous service, offered under substantially similar circumstances and conditions. What is "like traffic?" This is a topic which remains little explored in the context of air tariffs.

The Interstate Commerce Commission has held that for railroads no discrimination is involved where one rate is charged for shipment in standard sized cartons (of a certain size), and another, higher rate set for oversized cartons.<sup>53</sup> The Commission reasoned that different rates were applied to *different traffic*, each kind of traffic being open on equal terms to all shippers. Unjust discrimination of a like traffic is prohibited, but there can be no discrimination where the traffic is of different kinds or classes not competitive with each other.<sup>54</sup>

What makes differences in traffic? There are many different tariffs under the Interstate Commerce Commission regulation which apply to many different commodities and different types of goods, *i.e.*, the same rate will not necessarily apply to automobiles as to frozen foods. These differences apply to differences in freight. Are there any differences in passenger traffic, or is all passenger traffic "like" all other passenger traffic? If it can be argued that all passenger traffic is "like" all other passenger traffic,<sup>55</sup> it would be superfluous to include the requirement of "like" traffic in rules relating to passenger traffic. It does not appear that there

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51. *Smith v. Northern Pac. R.R.*, 1 ICC 611 (1887).

52. *New York, N. H. & H. R.R. v. ICC*, 200 U.S. 361, 391 (1906).

53. *National Knitted Outerwear Ass'n v. Akron, C. & Y. Ry.*, 156 ICC 629 (1929).

54. *Pennsylvania Miller's Ass'n v. Philadelphia & R. Ry.*, 8 ICC 531 (1900).

55. See cases cited note 49 *supra*.

has ever been a studied analysis of what constitutes different types of traffic, and how far such differences may extend.

Neither the CAB nor the courts in CAB cases have yet decided any cases in which the question of "like" traffic has been raised as an issue. *Transcontinental Bus System, Inc. v. CAB*,<sup>56</sup> illustrates how this requirement is usually handled. The court set out the requirement for an unjust discrimination, and included the requirement of "like traffic."<sup>57</sup> From that point on, however, the court completely ignored the question and simply assumed the traffic in question was like traffic.

### B. *Like and Contemporaneous Service*

It is difficult to separate "like and contemporaneous service" from "substantially similar circumstances and conditions," and in many instances no attempt is made to distinguish these factors. If a tariff is proposed creating different rates for services which are not "like and contemporaneous," the tariff may, nevertheless, be held to be unjustly discriminatory if there is not sufficient differentiation between the "circumstances and conditions" of services offered.

The *Transcontinental Bus System* case involved a "youth standby fare", under which a youth between the ages of 12-22 could travel at a reduced fare if space were available at the time of departure. It also involved a "young adult fare", a reduced reservation fare available to persons in the same 12-22 age group. The court concluded that the inconveniences attending the "youth standby fare" and the possibility of not getting on a particular flight, or of getting "bumped" enroute, were sufficient to render this fare "unlike service" to regular adult fare. On the other hand, in regard to the "young adult fares", the only distinguishing feature was the requirement that passenger have a youth identification card, and this, in itself, was too slight a distinction to differentiate from regular adult fare service.<sup>58</sup> Even in this instance, however, it is necessary to go further and determine whether it is an unjust discrimination to offer this different service to a specific group, in this case persons aged 12-22.

In earlier cases, the CAB has held that a sacrifice of convenience and the risk that space will not be available on the flight desired by the passenger is sufficient to distinguish the service and make it "unlike."<sup>59</sup> *Family Fare Tariffs—Complaint of Transcontinental Bus System, Inc.*<sup>60</sup> involved the validity of reduced fares for families traveling together. The Board found that the services were "unlike" regular-fare service even with a reservation under a family-fare plan, because the family-fare rates were

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56. 383 F.2d 466 (5th Cir. 1967).

57. *Id.* at 481.

58. *Id.* at 485.

59. American Airlines, Military Fares, 38 CAB 1038 (1963); Pittsburgh-Philadelphia No-Reservation Fare Investigation, 34 CAB 508 (1961).

60. CAB Order No. E-26431 (Feb. 29, 1968).

limited to certain days of the week even though a passenger traveling under the family plan is entitled to all of the in-flight services and amenities accorded regular fare passengers. The Board found the inconvenience and restrictions attendant upon use of the plan only on certain days of the week sufficient to differentiate it from regular fare traffic.

The same question is presented when a special service is provided, but it is offered only to a select group. Offering of a special excursion fare to groups of 25 students would unjustly discriminate against groups of 25 who were not students, no evidence having been offered to prove that the costs of selling the service to the student group would be less than to any other group.<sup>61</sup>

CAB decisions under the "like and contemporaneous service" requirement follow earlier cases decided under the Interstate Commerce Act. This Act prohibits more service to one customer than to another customer at the same cost. The Act is not limited to simply requiring that where exactly the same service is provided, the charges to different shippers must be equal. It is also unjustly discriminatory to charge different *rates* to different shippers for the same service.<sup>62</sup>

Competition between rival carriers does not, in itself, constitute a circumstance substantially dissimilar from traffic for which there is no competition, and, therefore, a carrier is not justified in treating customers differently, depending on whether there is another carrier competing for their business.<sup>63</sup> The same result was reached where a railroad tried to provide special services, in this instance warehousing, to some customers, but not to others.<sup>64</sup>

### C. *Substantially Similar Circumstances and Conditions*

Assuming that a rate structure provides for like service to like traffic, to avoid unjust discrimination there must also be "substantially different circumstances and conditions" under which different fares are offered. The principal question is which "circumstances and conditions" may be taken into consideration. In determining the validity of a tariff, must consideration be limited to factors directly relating to the carriage itself or may consideration be given to any economic factor presented by the carrier, even though it does not relate to the conditions of carriage? While there has been some confusion of the factors to be considered, early in its existence the Board held that it could look to factors outside the conditions of carriage. In *Air Passenger Tariff Discount Investigation*,<sup>65</sup> where the validity of the air travel discount card was at issue, evidence was allowed which showed that 50 percent of the air passenger revenue in 1939 was provided

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61. Capital Group Student Fares, 25 CAB 280 (1957).

62. *Wight v. United States*, 167 U.S. 512 (1897).

63. *Seaboard Air Line Ry. v. United States*, 254 U.S. 57 (1920).

64. *Baltimore & O. R.R. v. United States*, 305 U.S. 507 (1939).

65. 3 CAB 242 (1942).

by card holders. The Board sustained the discriminatory rate because of the "impetus subscribers have given to development of air transportation."<sup>66</sup> The Board further concluded that the amount of the discount was relatively small in relation to the amount of travel purchased by the subscribers, and, therefore, any discrimination would not be unjust.

There is no question that circumstances outside those directly relating to carriage should be considered. This is confirmed by a reading of sections 102 and 1002 of the Federal Aviation Act,<sup>67</sup> in which Congress directs the Board to consider a number of factors not directly related to the carriage itself to determine the validity of air fares.<sup>68</sup> When a carrier attempts to justify a tariff on grounds relating to the direct competition of another transportation medium, it seems clear that the Board must look outside the mere conditions of carriage.<sup>69</sup>

The leading Board decision in this area is *Tour Basing Fares*,<sup>70</sup> where the Board, in affirming the result of an examiner, excepted to his conclusion that only factors directly relating to the carriage itself could be relied upon. While the Board considered factors other than those relating to the conditions of carriage, it found that the only possible effect of this particular tariff was to increase revenue for the carrier, that even this effect was doubtful, and that this was not sufficient in itself to justify a discriminatory rate. The Board stated:

We do not mean, however, to say that an air carrier may never establish a rate differential . . . on the basis of business considerations. As we have previously pointed out, the Supreme Court has

66. *Id.* at 250.

67. See text accompanying notes 25 & 27 *supra*.

68. Confusion as to the type of factors to be considered has been caused by looking to the Interstate Commerce Act when it was not applicable. Unlike the Federal Aviation Act, the Interstate Commerce Act has two separate sections dealing with "unjust discrimination": section 2 which originally dealt only with the charging of different rates for like service (Interstate Commerce Act § 2, ch. 104, § 2, 24 Stat. 379 (1887), *as amended* 49 U.S.C. § 2 (1971)) and section 3 covering the charging of different rates for different service to a limited class (Interstate Commerce Act § 3, ch. 104, § 3, 24 Stat. 379 (1887), *as amended* 49 U.S.C. § 2 (1971)). In early cases, the Interstate Commerce Commission held that when determining if unjust discrimination existed under section 2, only circumstances directly relating to the carriage itself could be considered; but in proceedings under section 3, outside factors could also be considered. The Supreme Court upheld this distinction. *ICC v. Alabama Midland Ry.*, 168 U.S. 144 (1897); *Wight v. United States*, 167 U.S. 512 (1897). The Federal Aviation Act has never had multiple sections requiring that this sort of distinction be made. All questions of "unjust discrimination" are considered under section 404(b), which includes no indication that such a distinction should be made. Any limitation on 404(b) is provided by sections 102 and 1002; and these sections in themselves provide for considerations outside those directly related to carriage. It is, therefore, clear that the Interstate Commerce Act distinction is not applicable to the Federal Aviation Act.

69. *Cf. Eastern-Central Motor Carriers Ass'n v. United States*, 321 U.S. 194 (1944).

70. 14 CAB 257 (1951).

held, in cases involving surface carriers, that intercarrier competition . . . may be a justification for a rate discrimination . . . . There may be other ascertainable factors of like import to the welfare of the air carrier or to air transportation generally which may offer an adequate reason in the public interest for a departure from the public utility concept embraced in the "rule of equality."<sup>71</sup>

In the *Free and Reduced-Rate Transportation Case*,<sup>72</sup> the Board said:

[W]e may not properly deny consideration at the threshold to a carrier's asserted justification for a discriminatory fare merely because it stems from factors outside the carriage itself.<sup>73</sup>

However, there was left the problem of determining the weight to be given to the "business" factors asserted by the carrier to justify a discriminatory tariff.

The carrier contended that management should be left as free as possible to meet business problems with such promotional devices as its business judgment dictates. In rebuttal it was argued that airlines are public utilities and, therefore, all fares must be designed to give equal treatment for all. Both policies merit attention. The Board concluded that departure from the rule of equality and, thus, validation of a discriminatory fare should be permitted only when an extraordinarily important and serious business interest of the carrier or of air carriers generally is involved.<sup>74</sup>

Carriers should be entitled to present any factor which entered into its request for a particular tariff, since a multitude of important economic considerations enter into such a request. It is then upon the Board to determine in each particular case how much weight may be given to each factor under the appropriate statutes and regulation. This, of course, is quite different from limiting in advance the factors which a carrier may present as justification of its tariff. Any individual factor may or may not be compulsive by itself. In one set of circumstances, one or more factors may be decisive; in another fact situation, the same factor may not be important and, therefore, add little weight to the carrier argument.<sup>75</sup>

With this in mind, a look at some of the specific considerations presented to the Board in the past and the weight the Board has given to specific items can be of help in determining the direction the Board can be expected to take in the future. The important factors for consideration may often be those items found relevant in the past.<sup>76</sup>

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71. *Id.* at 259.

72. 14 CAB 481 (1951).

73. *Id.* at 482.

74. *Id.*

75. *Free and Reduced Rate Transportation Case*, 14 CAB 481, 482-83 (1951).

76. The courts have denied the right of the Board to resort to "the full spectrum of broad social policy considerations which might rationally bear on the issue . . . ." *Transcontinental Bus System Inc. v. CAB*, 383 F.2d 466 (5th Cir. 1967).



In *Air Passenger Tariff Discount Investigation*, the promotion of the air industry and the significant contribution to aviation was sufficient in itself to justify an otherwise discriminatory tariff.<sup>77</sup> In some circumstances the effect of direct inter-modal competition and the desire to promote business are factors which have been said to be important enough to the welfare of air transportation and the public interest to offer an adequate reason for departure from the rule of equality.<sup>78</sup> But generally the justification must involve an extraordinarily important and serious business consideration of the carrier, such as the right of management to meet business problems with business judgment.<sup>79</sup> A difference in cost of rendering the services is ample justification in itself for corresponding difference in rates, such as the difference in cost of regular fare traffic *vis-a-vis* standby passengers who travel subject to availability of seats after all reservation, regular fare passengers have been accommodated.<sup>80</sup> Direct competition from another transportation medium may be sufficient justification for rate differentials.<sup>81</sup> For instance, when overseas surface transportation had a tradition of providing free transportation to travel agents, a similar arrangement was allowed to air carriers on overseas routes to insure that the air carriers could compete. However, free transportation for travel agents was not allowed on domestic routes because there was no showing of such a tradition in domestic surface transportation.<sup>82</sup> Reduced fares for military personnel were allowed because reduced rates were provided by surface transportation.<sup>83</sup>

Direct competition with other airlines may also provide justification for rate reduction. In *I.A.T.A. Agreement Providing for North Atlantic Passenger Fares*,<sup>84</sup> the competition of international carriers with local service carriers over the same route was sufficient justification for a difference in fares. The international carriers were unable to compete with local carriers over one segment of an international route unless they were allowed to lower their rate on this segment to match the rates of the local carriers.

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77. 3 CAB 242, 250 (1942). This case involved sale of tickets at a discount for quantity use. The Board noted that even if this were a discrimination it would not be *unjust* discrimination because such discount was available to all, the amount of the discount was small in relation to the price of the ticket and it encouraged substantial use of air transportation.

78. Free and Reduced Rate Transportation Case, 14 CAB 481 (1951).

79. *Id.* at 483; *accord*, American Airlines, Inc., Fares for Former Employees, 38 CAB 670, 675 (1963).

80. American Airlines, Inc., Proposed Standby Youth Fares, CAB Order No. E-23137 (Jan. 20, 1966); *accord*, American Airlines, Inc., Fares for Former Employees, 38 CAB 670 (1963); I.A.T.A. Agreement, Rate and Traffic Matters, 26 CAB 716 (1957); Investigation of Full Adult Fares for Unaccompanied Children, 24 CAB 408 (1956); Certificated Air Carrier Military-Tender Investigation, 28 CAB 902 (1959).

81. Tour Basing Fares, 14 CAB 257 (1951).

82. Free and Reduced Rate Transportation Case, 14 CAB 481 (1951).

83. American Airlines, Military Fares, 38 CAB 1038 (1963).

84. 10 CAB 330 (1949).

Special group fares may be acceptable where the cost of serving the group can be shown to be less than the cost of serving individual passengers, and where the rate is made available to any comparable group.<sup>85</sup> In the case of reduced fares for military personnel the national interest was said to be sufficient justification for a difference in rates.<sup>86</sup> Finally, "ascertainable factors important to the welfare of the air carrier" may be taken as justification for a rate increase. The Board used this terminology in *Tour Basing Fares*,<sup>87</sup> but made no indication of what the "ascertainable factors" were in this instance.

Each of the following factors, *in itself*, is not sufficient to prevent a fare from being unjustly discriminatory, although a combination may be sufficient: mere expectation of carrier profit,<sup>88</sup> probable increase in net revenue,<sup>89</sup> probable reduction in airline subsidy,<sup>90</sup> good will<sup>91</sup> and social policy.<sup>92</sup>

Probably the most troublesome factor is the promotion of traffic. During the 1950's the mere promotion of additional traffic and the expectation of profit or a probable increase in net revenue could not be the basis of an otherwise discriminatory fare differential.<sup>93</sup> However, at that time the expansion of air traffic was not a problem because the airlines were in a profitable, high traffic period.<sup>94</sup> With the advent of larger capacity planes and increased competition both in and out of the air transportation industry, concern developed as to the financial stability of the air carriers. As early as 1957, it was held that, absent evidence that a reduced fare would carry traffic below cost, it would be more desirable to leave the solution of financial and competitive problems to managerial discretion than to substitute the judgment of the Civil Aeronautics Board.<sup>95</sup> In *Mohawk Airlines, Inc., Golden Age Excursion Tariff*,<sup>96</sup> the Board allowed a reduced fare to go into effect although it ordered an investigation of Mohawk's alleged need to improve its revenue position and to improve its load factor. In the last few years—a time when the load factors of all airlines have dropped and

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85. Capital Group Student Fares, 25 CAB 280 (1957).

86. American Airlines, Military Fares, 38 CAB 1038 (1963).

87. 14 CAB 257 (1951).

88. American Airlines, Inc., Fares for Former Employees, 38 CAB 670 (1963).

89. *Id.*; Group Excursion Fares Investigation, 25 CAB 41 (1957); *Tour Basing Fares*, 14 CAB 257 (1951).

90. Group Excursion Fares Investigation, 25 CAB 41 (1957).

91. Free and Reduced Rate Transportation Case, 14 CAB 481 (1951).

92. Investigation of Full Adult Fares for Unaccompanied Children, 24 CAB 408 (1956).

93. American Airlines, Inc., Fares for Former Employees, 38 CAB 670 (1963); A.T.C. Fare Discounts, 29 CAB 1344 (1959); I.A.T.A. Agreement, Rate and Traffic Matters, 26 CAB 716 (1957); Capital Group Student Fares, 25 CAB 280 (1957); Group Excursion Fares Investigation, 25 CAB 41 (1957); Free and Reduced Rate Transportation Case, 14 CAB 481 (1951).

94. Keyes, *Passenger Fare Policies of the Civil Aeronautics Board*, 18 J. AIR L. & COM. 46 (1951).

95. Capital Family Plan, 26 CAB 8 (1957).

96. CAB Order No. E-17111 (July 6, 1961).

when many have acquired new planes with increased capacity—the Board has encouraged experimentation with promotional fares designed to utilize available load capacity. It seems to be the current philosophy of the Board to permit a reasonable promotional fare to go into effect on an experimental basis, and to allow the fare to continue if it proves profitable to the airline.<sup>97</sup>

An airline in its function as a public utility has an obligation to treat all members of the public equally. At the same time, an airline is a private company in business for a profit, and, as such, desires to be free to meet business problems with such promotional devices as may appeal to its business judgment, recognizing that a business enterprise being operated for a profit will not long maintain rates that are uneconomical. These two positions are not necessarily inconsistent. Both have merit, and the job of the Civil Aeronautics Board is to protect both the interest of the public and the airlines. This is accomplished by permitting departure from the rule of equality to validate a discriminatory fare “only when an extraordinarily important and serious business interest of the carrier is involved.”<sup>98</sup> As previously indicated, however, the more recent cases show that an important factor in the Board’s final decision is often the general financial condition of the industry.<sup>99</sup>

#### VI. UNDULY PREFERENTIAL OR PREJUDICIAL

The third requirement which must be met for a fare to be valid is that it must not be “unduly preferential or prejudicial.” This requirement is the most limited in scope. Essentially, “undue preference or prejudice” refers to a tariff structure which discriminates based on distance or location.<sup>100</sup> It may refer to equal fares for traveling different distances or

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97. Mohawk Airlines Inc., Unlimited Travel Fares, CAB Order No. E-26359 (Feb., 14, 1968); Senior Citizen Standby Fare Proposed by Trans-Caribbean Airways, Inc., CAB Order No. E-23889 (July 1, 1966); Frontier Standby Fares, CAB Order No. E-23128 (Jan. 18, 1966); Delta Airlines, Inc., Reduced Fares for Youths on a Reserved Seat Basis, CAB Order No. E-23656 (May 9, 1966).

98. Free and Reduced Fare Transportation Case, 14 CAB 481, 483 (1951).

99. Family Fare Tariffs—Complaint of Transcontinental Bus System, Inc., CAB Order No. E-26431 (Feb. 29, 1968); American Airlines, Youth Standby Fares, CAB Order No. E-23137 (Jan. 20, 1966).

100. A tariff is also unduly preferential or prejudicial if it provides for different service to different classes of passengers at the same fare, or different fares for the same service, with no economic justification for the distinction. This is relatively unimportant in cases before the Civil Aeronautics Board, having been applied in only one case in which a special furlough fare to a small segment of the military population of Hawaii was held unduly preferential and prejudicial because the same fare was denied to thousands of other servicemen in the State of Hawaii. Aloha Airlines, Inc., CAB Order No. 68-11-104 (Nov. 1968).

This context of “unduly preferential and prejudicial” is recognized under the Interstate Commerce Act pt. I, 49 U.S.C. §§ 2, 3 (1970), and by the courts. For instance, difference in the treatment of passengers was found to be unduly preferential and prejudicial where railroad dining car facilities for Negroes were limited, and where even the limited facilities disappeared if there were unseated

different fares for traveling the same distance, when there is no economic justification for the distinction.<sup>101</sup> The most common problem area is "common faring," i.e., the practice of charging the same fare to different points. For instance, in *Hawaiian Common Fares*,<sup>102</sup> the fare from San Francisco to Honolulu was \$160. An unsuccessful attempt was made to make the same fare applicable to any other point in the Hawaiian Islands, involving increases in mileage ranging from 53 to 216 miles. In principle, a common fare is unsound because the cost of flying Point A to Point B, 100 miles, will be less than the cost of flying Point A to Point C, 200 miles. Requiring a passenger traveling the shorter distance to pay the same fare as a passenger traveling the greater distance would prejudice the former passenger, who is then required to assume a greater proportion of the applicable costs. Such a fare would prefer the longer distance passenger who carries a relatively lesser proportion of the costs.<sup>103</sup>

In the *West Coast Common Fares Case*,<sup>104</sup> all airlines used a common fare from Chicago to San Diego, San Francisco, Los Angeles, Portland and Seattle on the West Coast. In addition, certain stopovers were allowed at no extra cost. The result was that a passenger going to Phoenix, an intermediate stop, paid the same fare as a passenger going to San Francisco, making a stop in Phoenix on the way. The fares were sustained in this instance, but only because of unique circumstances. These common fares were first adopted to compete with the railroads who also common-fared the West Coast. (It was also claimed that railroads had started their practice in order to compete with water transportation.) The Chicago-West Coast traffic was based on a practice long established; a practice which, in fact, predated federal regulation of air rates.<sup>105</sup> (In the *Hawaiian* case no such established practice existed.) Although the Board approved the West Coast fares, it reserved the right to change its policy in the future. It also noted that this case should not be a yardstick for the determination of other common fare cases, because of the special nature of the practice approved.<sup>106</sup>

In *Pacific Northwest-Alaska Tariff Investigation*,<sup>107</sup> common-faring of

white patrons. *Henderson v. United States*, 63 F. Supp. 906 (D. Md. 1945). The court affirmed the right of passengers paying the same fare to get the same services. Where there is preference or prejudice between passengers, existence of a competitive relation between the passengers is not an element. Injury to the passenger prejudiced may be inferred from the mere fact that he pays normal fare for a lesser amount of transportation service. *Mitchell v. United States*, 313 U.S. 80 (1941); *ICG v. United States*, 289 U.S. 385 (1933).

101. *Frontier Excursion Fares Case*, CAB Order No. 22236 (May 28, 1965); *American Airlines Off-Peak Coach Service*, 28 CAB 25 (1958); *The Hawaiian Common Fares Case*, 10 CAB 921 (1949); *IATA Agreement Providing for North Atlantic Passenger Fares*, 10 CAB 330 (1949).

102. 10 CAB 921 (1949).

103. *Id.* at 924.

104. 15 CAB 90 (1952).

105. While these common fares were instituted in 1931, the Civil Aeronautics Act, which first regulated air fares, did not become law until 1938.

106. *West Coast Common Fares Case*, 15 CAB 90, 91 (1952).

107. 18 CAB 481 (1954).

air freight to Portland and Seattle from a given departure point in Alaska was approved because Portland and Seattle had long been considered a common trade area, and because other forms of transportation also provided common fares between the same points. However, common-faring of passenger service from Seattle to Fairbanks and Anchorage was disallowed because of the possibility of a competitive advantage over other carriers. No evidence was presented of current passenger diversion. The decision was based on the dangerous potential.<sup>108</sup> The reasoning is particularly interesting in view of the repeated statement that the prohibition against undue preference or prejudice exists for the protection of shippers or passengers, not other carriers.<sup>109</sup>

It has been suggested by at least one writer that the only reason for the holding in the *Hawaiian Fares* case was the lack of competitive ramifications, and that such fares would have been held valid if the reason for such fare had been inter-modal competition.<sup>110</sup> This is undoubtedly an important consideration. It should be noted, however, that the fact of preference or prejudice is not, in itself, sufficient to come within the prohibition of the Act. To bring about the disallowance of a fare, it must be shown that such fare is *unduly* preferential or prejudicial.<sup>111</sup> Preference or prejudice is undue unless it is justified by special circumstances such as compelling competitive relationships between carriers which require a carrier to grant a preference in order to obtain traffic, an actual difference in cost of services, or some other similar recognized transportation standard.<sup>112</sup> It is apparent that competitive justification is important.<sup>113</sup> It is also apparent that except in the case of outside justification, if there is no valid relationship between distance and cost, a fare will be held to be unduly preferential or prejudicial.<sup>114</sup>

## VII. CONCLUSION

In looking at a modern airport with the constant flow of jet traffic, it is not difficult to realize that the airplane today carries more passenger traffic than any other form of public transportation. With the present sophistication of aircraft, equipment, and terminals, it is more difficult to realize that aviation is also the newest method of commercial transportation. Yet, it is barely 30 years since economic regulation was first introduced to commercial aviation.<sup>115</sup> It has been only during the past two decades

108. *Id.* at 484.

109. *See, e.g.,* *Flying Tiger Line v. CAB*, 350 F.2d 462, 465-66 (D.C. Cir 1965).

110. R. CAVES, *AIR TRANSPORT AND ITS REGULATORS* 164 (1962).

111. *Northern Consol. Airlines, Inc., Proposed Fares*, 33 CAB 440 (1961).

112. *Hawaiian Common Fares Case*, 10 CAB 921 (1949).

113. *Northern Consol. Airlines, Inc., Proposed Fares*, 33 CAB 440, 444 (1961).

114. *Hawaiian Common Fares Case*, 10 CAB 921, 924-25 (1949).

115. The Civil Aeronautics Act, containing the first economic regulation of commercial aviation, became effective in 1938. 52 Stat. 973 (1938).

that most of the spectacular growth in the aircraft industry has occurred. It has been based on the scientific development during World War II, combined with the tremendous expansion of the economy following the end of the war. One statistical table will illustrate this point:

U.S. Commercial Aircraft Revenue Passenger Miles Flown	
1938	475,000,000
1948	5,928,139,000
1958	25,255,849,000
1968	87,101,056,000 <sup>116</sup>

The 1950's and 1960's have been a period of unprecedented growth. This growth has not been accomplished without some difficulties. The conversion from prop to jet aircraft in the early 1950's helped to expand aviation, but the increased costs of jet equipment and the larger capacity to be filled also created problems. New economic considerations came with the general economic problems of the 1950's, increased route competition in the 1960's, and the advent of the wide-bodied, larger-capacity, more expensive planes.<sup>117</sup> Air carriers have again been hard hit by the current general economic decline. These are just some of the reasons for the wide variety and tremendous number of new fares offered during these two decades. These are also just a few of the reasons why many questions have been raised concerning the requirements for a valid fare.

The general principles have been stated. A specific tariff will be valid unless it is found to be unjust or unreasonable, unjustly discriminatory, or unduly preferential or prejudicial. In terms of rate regulation by a governmental agency, 20 years is a short period of time. Nevertheless, not only have the general principles been established, but many questions concerning application of these standards have been finally determined. Many other questions remain unanswered. These must simply wait for sufficient time in which to clarify the position of the Board and the courts.

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116. CIVIL AERONAUTICS BOARD REPORTS TO CONGRESS 113 (1968).

117. 747's cost \$25,000,000 and have a capacity of 400 passengers. DC-10's cost \$15,000,000 and have capacity of 300 passengers.